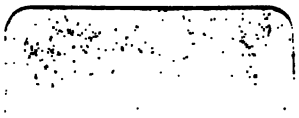
Sullivan · Address to the members of the bar of Suffolk, Mass. 1825



MR. SULLIVAN'S ADDRESS

TO THE MEMBERS

OF THE

Bar of Suffolk.

AN

ADDRESS

TO THE MEMBERS OF THE BAR

OF

Suffolk, Mass.

AT

THEIR STATED MEETING

ON THE

FIRST TUESDAY OF MARCH, 1824.

By WILLIAM SULLIVAN.

BOSTON,

PRESS OF THE NORTH AMERICAN REVIEW.

I. R. BUTTS, PRINTER.

1825.

cs 13119.1.35

GENTLEMEN OF THE SUFFOLK BAR,

ON the day when this Address was delivered, you did me the honor to request a copy for the press. I then thought, that you complimented *your own brotherly good will*, much more than the *merit* of these hasty sketches.

Since that time, several members of the Bar, and some gentlemen, who are not of the Bar, have expressed an opinion that the *facts* stated, ought to be published. I have, therefore, concluded, though at a late period, to comply with your request. I am, however, apprehensive that, *as to the public*, I shall have done little more than to evince the regard, which an individual may feel for his profession; and, *as to yourselves*, to avail myself of an opportunity to repeat the

grateful acknowledgments which are due, for the honor which you have conferred, during several successive years; and to express the affectionate respect, with which, I am,

Gentlemen,

Your Friend, and Brother,

WILLIAM SULLIVAN.

April 25, 1825.

Address.

As we find civil society, every where, divided into classes, which are engaged in some one description of labor, and that these classes subdivide, as numbers and wealth increase, it may be inferred, that it was the design of the AUTHOR of our being, that the means of subsistence, and of comfort, should be promoted by *division of labor*. Possibly, every individual is formed by nature, to labor, in some one department, more successfully than in any other. There are instances of original, native propensity, to excel in certain employments; especially in music, sculpture, painting, and in mathematical pursuits. There are instances of genius breaking through all

obstacles, and attaining, almost without the aid of education, to eminent distinction. There are instances of very early indications of vicious propensities, which no discipline could eradicate. The difficulty of deciding whether there be, or be not, a natural adaptation to particular employment, lies in the inability to determine *how much* of any character, which we examine, is original, and how much is imitative and derived from education.

Selections of employment are commonly made at an age, when original or acquired dispositions are not unfolded; and when fitness or unfitness, whether from nature or from education, or from both, can hardly be ascertained. Selections are often made from misapprehension, or from accident, or from causes which cannot be controlled. Unsuccessful effort, in one department, does not negative the supposition, that eminence might have been found in some other. We are, at this day, familiar with inventions and discoveries, which, if foretold, would have seemed exceedingly visionary; but it may not be a mere imagination, that among the improvements of future times, will be that of discerning in early life the department of labor, to which each one is best adapted.

Among classes of men, by whatever means the members become associated, there must always be a community of interests. Each class is, for some purposes, separated from all others, though sustaining a relation to all others. We find that most of these classes exercise a voluntary government among themselves; and generally with the assent of all others, because the rules which they establish are adapted to fit those who observe them, for the more able and faithful performance of the obligations assumed. This organization is, especially, useful among those, whose labor is merely *intellectual.*

Rules are, at least, as useful to *our class*, as to any other. The main purpose of our Republic is to maintain civil freedom, and to preserve to every one, the rights of religious conscience, and to secure the right to voluntary industry, and its fruits. As these depend on *laws* constitutionally derived, the profession of the law springs from our civil institutions. Our vocation is held in honor and esteem, in proportion to the degree of civil liberty which is enjoyed. It is an humble and degraded order, in proportion to the degree of despotism under which it exists.

Whatever merit may belong to lawyers in continental Europe,* it is only in *England*, that we find what we justly consider as our own profession. It is in *England* only that the senti-

* The Law of continental Europe, of the present day, seems to be compounded of the feudal, civil, and canon law, variously modified by customs, usages, and sovereign decrees, and by the influence of commerce. In France and in Prussia, an attempt has been made, (with what success time must disclose,) to make a system out of all these materials. The same effort is in process in Russia.

In *Spain*, the study of the Law is pursued in colleges. A peculiarity of dress distinguishes students in different branches. It was a point of honor among those, who had obtained a fellowship, never to desert the interest of their colleges; and never to quit a fellowship, but for a place among superior judges. The avenue to the Bench was never through the Bar; nor through professional learning. Judicial office depended on family, and on the influence of the colleges. The court is addressed viva voce. The forms of process in the different "kingdoms" of the Peninsula, differ from each other; are complex, tedious, and expensive, and incumbered with a multitude of useless provisions. Though some men have risen from the bar to eminence in other employments, Lawyers are a comparatively low order of men in Spain; and here, as in most countries in Europe, admission to practice is connected with some financial exaction. There has been a sort of corruption here worse than that of money, in favor, influence, and flattery; and a kind of court in the evening parties of judges, or their

ment of civil liberty has been felt, and sustained by political institutions. As soon as the legislative, judicial, and executive branches of government became separate and independent; as

ladies, which was not unfrequently, as it is said, the quicksand of justice.

The administration of justice in *France*, considering the nature of its government, was very peculiar;—and is still so in many respects.—The office of Judge (as stated in *Butler's Reminiscences*) was *purchased*. Yet the Judges were said to be, and are still said to be, men of high honor and integrity, and to have yielded less than any class of men, to revolutionary opinions. But what is very remarkable, the profession of the law was connected with a sort of knighthood; and fees were proportioned to the number of *horses*, by which lawyers might be lawfully followed to Court. They wore an equestrian costume. This order ceased in 1790.

Admission to the French Bar is preceded by examination. The profession is divided into branches, as notaries, procureurs, avocâts; the former exercise important powers. In jury trials only, (of recent origin,) pleadings are spoken; in all other cases, written. A costume is worn not unlike that at the English bar; but a young man, who has plenty of hair on his head, is not obliged to wear *a wig* over it. It seems that only the *official* lawyers are transferred from the Bar to the Bench.

In *Germany* and *Poland* the civil law is the basis of legal proceedings. But the lawyers wear no costume. Every thing is done in writing, and consequently, there is very little, if any thing, to be done in Court. The profession there is on the

soon as there were permanent laws to be expounded and applied by men, who did not make them, and who were not to execute them, our profession took its place in English society. We

common level of industry in other vocations. It is said that justice is very fairly administered in Germany.

In *Russia* the lawyers are mostly Germans. The law is the civil law, variously modified by imperial decrees. In this country the career of distinction is open to the members of the profession, whenever it can be entered in right of superior talents. Lawyers have risen to high state offices, and have been employed in some of the highest diplomatic missions.

It may be inferred, that although extraordinary abilities break forth from the bar, attract attention, and secure elevated employment, the profession, in continental Europe, are considered as an inferior order of men.

Division of political powers, transmission of judgments as authorities, arguments in public, decisions pronounced in public, accompanied by the reasons on which they are grounded, indicate the presence of civil freedom; and the rank of those who are employed in advocating justice. Throughout the continent of Europe there are no books of reports; all sentences or judgments are short, and are given without reference to authority or principle; and decide nothing but the case in which they are given.

In the Roman forum no fees were taken till the time of the Emperors. Professional services were rewarded by presents, or by legacies. Cicero mentions it, in honor of Lucullus, that

see that it associates itself there with the right of precedence, with the distinction of title, with the honor of noble descent, with the confidence and respect of royal authority. While the favor of the crown, family influence, wealth, and devotion to party, may, and do constitute military and naval commanders, ambassadors, and peers of

he received great sums in this way ; and he boasts that he had received great sums for his eloquence,—equal to £200,000 sterling. *Middleton's Life of Cicero.*

Perhaps the *quiddam honorarium* may be referred to the Roman law ; it would neither be demanded, nor reclaimed. To the same law may be referred, probably, the English practice of denying counsel to criminals

The mode of consulting a Roman lawyer was this. The lawyer was placed on an elevated seat, the client, coming up to him, said, *Licet consulere?* The lawyer answered, *consule.* The matter was then proposed, and an answer returned very shortly, thus; *Quæro an existimes,* vel, *id jus est, nec ne? Secundum ea, quæ proponuntur, existimo, placet, puto.*

Adams' Roman Antiquity 201.

Lawyers gave their opinions either by word of mouth, or in writing, commonly without any reason annexed, but not always.

The lawyers of these days do not see their clients quite so early in the morning as those of Rome did.

Agricolam laudat juris legumque peritus
Sub galli cantum, consultor ubi ostia pulsat.

Romæ dulce diu fuit et solemne, reclusa
Mane domo vigilare, clienti promere jura.

the realm, the way to professional eminence is as short from the yeoman's cottage, as from the nobleman's manor.* Perhaps it is the best feature in the English government, dependent as it is on hereditary right, that professional worth alone will rank the fortunate possessor with those, who claim the highest civil distinctions. If, in *England*, our profession attains to such honorable rank, it must be because England is governed by laws, and not by arbitrary will.

If, *here*, the profession be not held in all the esteem, which the nature of our government would indicate, it may be, in some degree, its own fault; but much more is to be referred to that freedom of opinion, (happily inseparable

* Lord Chancellor Eldon, (John Scott) Lord Stowell (William Scott) were men of very humble origin. The present master of the Rolls, the Right Honorable Lord Gifford, rose to his present rank, through the offices of Solicitor General, Attorney General, and Lord Chief Justice of the Common Pleas, without the aid of family influence or wealth. Sir John Singleton Copley, Knt. was the son of Mr. Copley, the painter, who dwelt in Boston, in a house which stands where David Sears, Esq. dwells; and is now Attorney General in England. There have been many instances in former times, Lord Kenyon was one; and, singularly so, the able Edmund Saunders, Lord Chief Justice of K. B.

from the nature of society here,) which originates some jealousy as to the members of the bar. Allowing to all other classes of men their well earned reputation for intelligence and probity, in their respective vocations, the business of a lawyer requires, that he should know the course of business in which all other men are engaged. He must know how the law applies to all human transactions. Motives to actions must be sought for, on well grounded principles of philosophy; and he must search out, and apply analogies, in branches of science, which are collateral to his own. A thorough lawyer may properly be said to be a "*universal man.*"*

* Two things seem indispensable to eminence at the bar; a thorough knowledge of law, and ability to use this knowledge *in Court.* Reading alone will not secure the first. It must be reading with a discriminating and retentive mind. The power of meeting successfully the conflict of a trial, requires not only such knowledge, but an almost intuitive perception of a proposition, and its consequences; of the fact proved, and of the law which governs it. A man may be a profound lawyer, yet no advocate; but he cannot be an advocate, without being a lawyer. The good sense of our community does not allow the effervescent speaking which is, in some places, a proof of professional merit. Neither does it require the very quiet manner, in which some of us perform our duties in a court house.

Habitually called on for varied exercise of intellectual power, it is not surprising, that some of our number acquire great facility in discrimination; and a ready familiarity in the application of learning. It will appear from further observations, that they have been considered as holding an important place among those who have been confided in, as best qualified to perform the duties of legislation, and to assist in giving form, and force, to public opinion.

Whoever examines the history of this country to know, by whom the most bold and effectual measures *in the cause of freedom* were suggested, and carried into effect, will feel, at least, some respect for *Lawyers.* Whoever would know to what minds he is indebted for the forms of government, which have been found to secure the best condition which human nature can en-

Great legal learning, great readiness in the use of it, and commanding eloquence, are a rare combination. Our employments are too diversified to permit such approach towards it as might often be obtained by *singleness of pursuit.* One, who has absented himself from the bar two or three years, is surprised to find, on returning to it, what a treasury of doubts he has accumulated. Here, a lawyer must engage in all departments of his profession, besides attending, in many instances, to a multitude of concerns foreign to forensic discipline.

joy, will admit, that *Lawyers* are entitled to some portion of confidence and esteem.

An association of men, who have had, and who will continue to have, influence in the administration of government, founded, so much as ours is, *on public opinion*, have important duties to perform, and may be essentially useful. Whatever its members may do, tending to make themselves worthy of public confidence, and more able to justify that confidence, must be a public benefit.

I propose, gentlemen, on this occasion, to offer to you such facts as I have been able, in a short time, and amidst many avocations, to collect, on the origin and history of our profession in this State. I have been encouraged to do this by the belief, that the rank of our profession, in esteem and respect, has gone forward, in equal step, with that of rational liberty, honest patriotism, and fervent zeal, to promote the best interests of society.

This attempt will be desultory, and, perhaps, uninteresting. The materials are few, and not attractive. It offers you no fruit of erudition;

no eloquence; nor any thing but the result of patient labor.

We have now the habits, manners, and social institutions of an old and experienced people. We are this day on a level with, and in some things enviably higher, than some of the oldest nations of Europe. And yet, three successive lives, of no uncommon duration, would cover the whole lapse of time between the present hour, and that in which the savage existed where we dwell. The social condition of the western world is as new in the experience of mankind as the American continents once were. This nation has some right to be proud of its modes of government, and of the happiness which they secure. But it has boasted of these things somewhat unbecomingly, and a war of comparison has ensued between our own and British writers, which has shed no glory on either. There is enough to satisfy reasonable self-love, in claiming no more than what has been effected, and gained. In struggling with, and overcoming the difficulties which occurred, in arriving at the position in which we find our Republic, our profession has had a full share of agency.

The colony charter was intended to establish a *trading company*. It conferred no powers but such as were necessary in the management of such company. The records remained in England till the year 1629, and were then transferred to this country. The original book is now in the office of the Secretary of State. The Governor, and assistants, were the only depositaries of power. They exercised legislative, judicial, and executive authority. These officers inferred from the charter, or from the *patent*, (as it was commonly called,) whatever power, a new, increasing, and peculiar, community required. When the patent was silent, the *scriptures* were resorted to as the proper guide. The clergy, and the elders, were the expounders of the law, in all new exigencies. The law was frequently made for the occasion, in which it was to be applied. In such a society, our profession could have no place. The forms of process were very simple. So far as the ancient records enable us to judge, no legal acquirements were used, or necessary, in the administration of justice. The cause of complaint was stated in a few words, and there were no pleadings. In the North American Review, of July 1823.

there is a very able essay upon the laws, and the administration of justice, from the first settlement of the country, to the charter of William and Mary. It is from the pen of one of our junior brethren in Essex,* and deserves a careful perusal of every member of the bar. Those who would inform themselves of the early his-

* Caleb Cushing, Esq. of Essex county.

This writer has not noticed some traits of the times, which he has rendered so interesting by his labors; traits, which prove our forefathers to have been more *polished*, than has been commonly supposed. As each generation must consider its own social forms, and fashions, to be the best, it is pleasant to find that our forefathers, within thirty or forty years after the first settlement, agreed with the *polished* men of these days in *two things*. In 1649, Governor Endicot, deputy Governor Dudley, and seven others, (two of whom were afterward in the office of Governor of the Colony,) by a formal, and public act, solemnly protested against the wearing of *long hair*, as a thing "detestable, uncivil, and unmanly, whereby men doe deform themselves, and offend sober, and modest men, and doe corrupt good manners."

And about the same time, the government of the colony enacted as follows—"Nor shall any take *tobacco* in any inne, or common victual house, except in a private room there, so as the master of said house, nor any guest there, shall take offence thereat; which if any do, then such person shall forthwith forbear, upon pain of two shillings and six pence, for every such offence."

tory of the colony of Plymouth, are referred to the manuscript folios, most laboriously and accurately compiled, and now preserved in the office of the Secretary of State. This work was done by a committee authorized by the State; the labor, of presenting the result, devolved on one of them.*

Hutchinson says, (1 vol. 400,) that, for more than the first ten years, the parties spoke for themselves; but sometimes, when the cause required it, they were assisted by a *patron*, or man of superior abilities, but without fee or reward. It marks the simplicity of the times, that the jury were, by law, allowed, if they were not satisfied with the opinion of the Court "*to consult any by-stander.*"

There were *attorneys* here, about ten years after the settlement of the Colony. There is a notice of one *Lechford*, who came over in 1637; and who returned to England in 1641. He

* The Committee were, the Reverend Dr. James Freeman, the Hon. William Davis, Benjamin R. Nichols, Esq. The latter gentleman is alluded to, in the labor of copying the selections, and preparing the Index. There are twelve folio volumes. These manuscript volumes are a singular example of patient labor, beautifully executed.

published a pamphlet called *Plain Dealing*, in which he says, that when he came to New England, he found that every church member was a bishop, and not inclining to become one himself, he could not be admitted a freeman among them; that the General Court, and Quarter Sessions, exercised all the powers of Parliament, King's Bench, Common Pleas, Chancery, High Commission, Star Chamber, and of all the other Courts of England. This man committed some offence, and was debarred from pleading any man's cause but his own. Deprived of practice, he returned to England in a dissatisfied humor, which probably caused his publication.

In 1643 the Colony was divided into four shires. "Norfolk" included the present county of Essex, and also Dover, Exeter, Hampton, and Portsmouth.

In 1647 the Governor and assistants ordered the importation of,

2 copies of Sir Edward Coke on Littleton;
2 " of the Book of Entries;
2 " of Sir Edward Coke on Magna Charta;
2 " of the New Terms of the Law;
2 " of Dalton's Justice of the Peace;
2 " of Sir Edward Coke's Reports.

This importation was, probably, the first introduction of the *common law* into the Colony. But a change in practice was not among its immediate consequences. No historical attempt to trace the adoption of the common law, by our ancestors, has been made. It would be a very difficult labor, and is becoming, more and more, merely matter of curiosity. At the present day, we consider the whole body of the common law, which can be applied to our condition, *as our law.*

In 1636 the Colony of New Plymouth recognised among what they denominated their "general fundamentals," "the good and equitable laws of our nation, suitable for us in matters, which are of a civil nature, (as by the Court here has been accustomed,) wherein we have no particular laws of our own." At the same time they recognised the trial by jury, as practised in England. But the first settlers in the Massachusetts Bay Colony, did not recognise the law of England; but declared their own laws, and the law of GOD, to be their rule. After the charter of 1692, our ancestors made a formal declaration of privileges, in the spirit of *magna charta.* The common law does not appear to

have been regarded under the old patent, nor after the charter of 1692, for many years. But yet its provisions were gradually adopted: in what manner, and on what occasions, cannot now be ascertained.

The origin of our forms of process, may be traced in the volume called "The General Laws, and Liberties of the Massachusetts Colony," printed in 1672. This was a revision of a code printed in 1648, of which no copy is now extant. Our process of review, so justly exploded, and our process of attachment, (which some persons think ought to be abolished,) may be traced to the early laws of the Colony.

In 1654 there were attorneys here, some of whom practised in the Quarter Sessions, and some before the General Court, which exercised judicial as well as legislative power. In that year a law prohibited every person, who was an usual "or common attorney, in any Inferior Court," from sitting as a deputy in the General Court. It is probable, that the attorneys of these days, were not of importance, in society; whatever they were, very little remains of them, in any records, public, or private. The early simplicity of legal proceedings, undoubtedly, con-

tinued down to the time of the charter. The judges exercised a patriarchal, rather than a judicial authority. This may be inferred from the fact, that in 1681, Mr. Hinckley, Governor of Plymouth, wrote to Mr. Stoughton (who seems to have been the greatest judge of his time, though not a lawyer, but originally a clergyman, and then a magistrate,) for advice on a case, which had occurred in Plymouth. Mr. Stoughton replied. "The testimony you mention against the prisoner, I think, is clear, and sufficient to convict him; but in case your jury should not be of that opinion, then, if you hold yourselves strictly bound by the laws of England, no other verdict, but *not guilty* can be brought in. But according to our practice, in this *jurisdiction*, we should punish him with some grievous punishment, according to the demerit of his crime, though not found capital."

There was no law officer in public prosecutions. Hutchinson says, (1 vol. 401,) on a verdict of not guilty, in a capital crime, it was permitted that one of the Court should rise, and charge the prisoner with some other crime, and to have a new trial ordered on such charge.

During Sir *Edmund Andros'** short, but tyrannical reign, his Secretary, the odious and rapacious *Randolph*, gives some account of the lawyers of that day. This man, in his office of Secretary, considered himself entitled to all the clerkships in the country. He complained that one *West*, to whom he farmed a clerkship, "ran away" with £1000 yearly of his dues. In a letter to a correspondent in England, dated the 24th January, 1687, he says, "I have wrote you the want we have of two, or three, honest attorneys, if any such thing in nature. We have but two! one is West's creature, and came with him from New York, and drives all before him. He takes extravagant fees, and for want of more attorneys, the country cannot avoid coming to him. I have wrote Mr. Blackthwaite the great necessity of judges from England."

On the expulsion of Andros, and his followers in 1689, the government was assumed by the principal men of the Colony, and was adminis-

* It is said Sir Edmund Andros lived in an old house, which was standing within thirty-five years, nearly on the spot where Mrs. Ann Bent now dwells, a little north of the corner of Summer Street. His country seat was in Dorchester; the house is still standing, nearly opposite the Rev. Dr. Harris' gate.

tered by them till the charter of 1692 came over. The charter conferred the powers of civil government, and separated the judicial from the legislative authority. Plymouth Colony, and Maine, were included in the territorial limits of the province. The charter, though dated in October 1691, did not go into operation till the spring following. Sir *William Phipps* arrived with it on the 14th of May, 1692. He was an illiterate and weak man, and very unfit for the trust confided to him. He was a believer in *witchcraft.** Among his first acts was the appointment of seven commissioners of oyer and terminer, to try the persons accused of witchcraft in the county of Essex. The charter did not empower the Governor to appoint such commissioners. The persons executed were not only deprived of life, for an imaginary crime, but without any legal authority. There is some apology for Governor Phipps, in this, that some men, who were far above him, in mind and information, were under the influence of the same

* Sir William Phipps built and lived in the house, in Salem Street, which is now used as "the Asylum for Indigent Boys." Charter Street, which runs by one end of it, probably took its name from the instrument, of which he was the bearer.

delusion. About this time, and some years before, prosecutions, for witchcraft, frequently occurred in England and Scotland. And one in England as late as the year 1714.*

In 1692 the first act on the judiciary was pass-

* The 6th Chapter of Lord Coke's 3d Inst. is devoted to panegyric on the Statutes for punishing "conjuration, witchcraft, sorcery, or inchantment." He says, "A conjurer is he that, by the holy and powerful names of Almighty GOD, invokes and conjures the *Devil*, to consult with him, to do some act." "A witch is a person that hath conference with the *Devil*, to consult with him, to do some act." An inchanter, incantator, is he, qui carminibus, aut cantiunculis dæmonem adjurat. They were, in ancient times, called Carmina, because in those days, their charms were in verse.

"Carminibus Circe socios mutavit Ulyssis—"

And again,

"Carmine, de cœlo, possunt detrudere lunam."

In the 9th Geo. 2d, (1736,) the acts on witchcraft, &c. were repealed; and at the same time, *pretensions* to witchcraft were made punishable.

In the 16th of Charles 2d, (1676,) Amy Duny, and Rose Cullender were tried at Bury St. Edmonds, for witchcraft, convicted, and sentenced by Sir MATTHEW HALE! to be hanged; and were executed!

The best accounts of the witchcraft prosecutions, in this country, are found in Hutchinson's history, and in Douglas' history. But the genuine marvellous, *as to what witches can do*, will be found in *Mather's Magnalia.*

ed, establishing Justice Courts, Courts of Quarter Sessions, Courts of Common Pleas, and the Superior Court of Judicature, which Courts continued down to the time of the Revolution. No appointments were made, pursuant to this law, till 1695; nor was there any change in professional practice till 1701. Forms of writs were then established, and the Courts were empowered to make rules for the regulation of practice. We here find the *first institution* of regular judicial proceedings. The attorney's oath, now in use, was then provided for. The law of 1714, which required the endorsement of writs, provided that no person should "entertain more than two of the sworn allowed attorneys at law, that the adverse party may have liberty to retain others of them, to assist him, upon his tender of the established fee, "which they may not refuse." The fee was twelve shillings. It appears from the records, that technical distinctions were not much regarded after this reform; for example, the plaintiff declared in case, to recover land in fee; and the pleas were very short denials of the matter alleged. *Stoughton*, *Danforth*, *Richards*, *Winthrop*, and *Sewall*, were the judges in the Superior Court, when the charter

came; that is, they were those of the *assistants*, to whom the duty of administering justice was commonly assigned. All of them, but Richards, were appointed under the charter, and for him, *Cooke* was substituted.

Under such judges, no advancement in professional science, could be expected at the bar. It is from a learned bar, that a learned court must be made; and judges in their turn, and by their example, will produce science, and learning at the bar.

During the eighty years, which elapsed between the establishment of courts under the charter, and the commencement of the Revolution, *thirty-two* judges were commissioned to the superior bench. Paul Dudley, Edmund Trowbridge, and William Cushing, were the only lawyers among them. Dudley was educated in England; many professional *improvements* are supposed to have originated with him. In the latter years of this period, many eminent men appeared, some of whom were highly distinguished for learning and eloquence. The absence of the advantages now enjoyed, of separating the law from the fact, and the want of reports, were serious obstacles to the trans-

mission of professional fame. Cases, which are not to be cited as precedents, however ably argued, will not preserve the reputation of those who manage them. Unless the evidence of professional worth, and talent, can be transmitted by books, or is aided by political, or collateral circumstances, it is soon lost. We are indebted to one of our brethren,* for assisting to rescue the fame of some distinguished lawyers from the overwhelming of time.

Among the eminent men of charter days, were *Auchmuty*, father and son. The former was a barrister during the administration of Belcher and Shirley. He was sent to England, as the agent of the province, and appears to have been held in high respect, as a politician, as well as in his profession. In his latter years he was judge advocate of the court of admiralty. The son was judge of that court, when the Revolution began. It is said of him, that he was eminent as an advocate in trials by jury. Among the men of these days, we should remember, with the highest respect, the names of *Read*, *Pratt*, *Gridley*, *Trowbridge*, *Adams*, *Otis*, and the

* Lives of Eminent Lawyers and Statesmen, by Samuel L. Knapp, Esq.

learned, and pious *Thatcher*. The first of these is said to have originated the forms of conveyancing now in use. In the last years of the charter, appeared the learned, eloquent, and undaunted *Quincy*, who did not live to see the commencement of that emancipation, which he so earnestly labored to secure. His address to the jury in the trial of the British soldiers, November, 1770, (accused of the massacre, in March of that year,) suffers by no comparison as to its eloquence. The argument of the senior counsel, (*John Adams*) was exceedingly elaborate and learned, especially on the *law* of the case. Considering his known devotion to the cause of liberty, at that time, it required no little independence to appear in defence of the prisoners, when the popular sentiment was so highly adverse to his side of the case. He begins his address to the jury: "I am for the prisoners at the bar, and shall apologize for it, only in the words of the Marquis Beccaria. 'If I can but be the instrument of preserving one life, his blessing, and tears of transport, shall be a sufficient consolation to me, for the contempt of all mankind.'" It may add something to the merit of assuming this defence, that its labors were,

probably, gratuitous. In the printed history of this remarkable trial, which continued through eight days, the counsel for the crown were *Robert Treat Paine* and *Samuel Quincy*, though the indictments were signed by *Jonathan Sewall*, then attorney general. The counsel for the prisoners, were *John Adams*, *Josiah Quincy, Jr.* and *Sampson Salter Blowers*. The latter does not appear to have addressed the jury. The judges were *Benjamin Lynde*, *John Cushing*, *Peter Oliver*, and *Edmund Trowbridge*, all of whom charged the jury. Though *Capt. Preston* is charged in the same indictments, he does not appear to have been tried at this time. He was probably tried in the preceding October. Dr. Eliot says, in his Biographical Dictionary, that John Adams and Robert Auchmuty were his counsel, and that "no plea was ever more admired than Auchmuty's, though the tide of prejudice was much against his cause. It has since been handed round in manuscript, but at this day, in the reading, it falls short of the delivery."* But Gordon says (1 vol. 193.)

* A copy of this speech has been preserved by Hon. Judge Dawes, which he thinks is in Auchmuty's own handwriting. This is one of the relics, which would properly belong, *to an his-*

that Adams and Quincy were his counsel. Two of the prisoners were convicted of *manslaughter*. They prayed the *benefit of clergy*, which was allowed; and were burnt in the hand in open court, and discharged. Probably, this is the only instance of such a plea.

Dr. Eliot is supposed, in the same work, to have done some injustice to the memory of Chief Justice *Pratt;* and if so, it is to be regretted, that Mr. Tudor, in his Life of *Otis*, has taken him for an authority. These errors have been ably corrected, in the Anthology for May, 1810. He is there presented in his true light. Among other notices of Chief Justice Pratt, this reviewer says,* "that his powers in poetry were celebrated, in his lifetime, as the strongest marks of his mind." He gives an instance in an extract from one of his poems, descriptive of the soul, hovering over the body in the hour of death, and remarks, that "it has been justly said to contain

torical society of the profession. Though not connected with this subject, it may be permitted to express some regret, that in this changing and improving age, there is not *an historical society for the city*, to notice and record things of early days, which are every where falling around us.

* Supposed to be the Rev. President Kirkland.

as much vigor of thought, analogy, vividness of figure, and firmness of line, as any verses in the language."

'As o'er a fen, when Heaven's involved in night,
An ignis fatuus waves its new-born light;
Now up, now down, the mimic taper plays,
As varying zephyr puffs the trembling blaze.
Soon the light phantom spends its magic store,
Dies into darkness, and is seen no more.' "*

* Chief Justice *Pratt* was a small, thin man, and moved on two crutches. Ex-President Adams remarked to a descendant of *Pratt*, (who happily escaped from the drudgery of the bar, to be a successful and eminent merchant,) "that he had looked with wonder to see such a little body, hung upon two sticks, send forth such eloquence and displays of mind."

Pratt's office was the second door north of the corner of Court street and Cornhill, where Lincoln and Edmands now keep. Oxenbridge Thacher kept his office opposite the south door of the State House. C. J. Pratt's country seat was on Milton Hill; the third house eastwardly of the seat of Barney Smith, Esq. (which was Governor Hutchinson's country seat.) There is on Pratt's place a shagbark tree, which produces the finest nut of that kind, that is known here. It is said that Pratt, who went to New York, under the appointment of the Chief Justice of that State, sent the nuts from which the tree orignated from thence. His letters, now preserved by his descendants, express an intention to resign his place, and return to the practice in Boston. But this removal was prevented by his death, which occurred in 1771.

Some manuscript reports exist, which give some information on the course of practice. In 1762 the case of Dudley and Dudley arose on Governor Dudley's will. The question was, whether the devise was a fee simple, or an entailment. In the first argument *Otis* and *Gridley* contended, that it was the former; *Kent* (a very inferior man) and *Trowbridge*, that it was the latter. In the second argument, *Auchmuty* was substituted for Kent. The argument was a very able one, even in comparison with those of modern times. The court decided the devise to be a fee simple. But as none of its members were lawyers, they wisely forbore to give any reasons for their opinion. The practice seems at this time to have been much embarrassed with technical distinctions, which characterized one period of English practice. As an example of this, a defendant was called *blacksmith*, he pleaded, that he was a *nailor*. An acute argument was had. The court unanimously decided that a nailor was a blacksmith, though they *disagreed in their reasons* for the decision.

Before adverting to the state of the profession, in the time of the Revolution, it may not be unacceptable to remark on some things, which are incidental to it.

There are many persons present, who remember the scarlet robes, with deep facings, and cuffs of black velvet, which were worn by the judges; their bands, and their powdered wigs, adorned with black silk bags; and their black silk gowns worn in summer. It is probable that this costume was assumed, when the judges were first appointed under the charter, by royal authority, in imitation of the royal judges at home. However this may be, it was worn long before the Revolution. *Minot*, speaking of the destruction of Chief Justice Hutchinson's house, by the mob, on the night of the 26th of August, 1765, says, "the plate, family pictures, most of the furniture, wearing apparel; the books and manuscripts, which had been thirty years collecting, were stolen or destroyed; so that on the next day, when the want of a quorum of the judges necessitated the Chief Justice to take his seat in the superior court, he was obliged to appear in his only suit, and without the habiliments of his office."*

* The house in which Chief Justice Hutchinson lived, and which was entirely demolished, except the walls, was in the North Square. William Little, Esq. lives on the same spot, and within the same walls. The stamp office, which was de-

This costume was not, probably, worn during during the Revolution. If it was not, it was resumed soon after its close. It was laid aside, it is supposed, because it was not suited to the simplicity of our form of government. The last appearance of the judges in gowns, was at the funeral of Governor Hancock, in October, 1793, when they wore black silk. This official dress is said to have been borrowed from the Welsh judges, who are said still to wear such. It did not resemble any costume worn by English judges.

Barristers wore black silk gowns, bands, and bags.

The old state house, at the head of State street, now appropriated to various uses, and some of them not the most hallowed, (excepting

molished about the same time, stood at the head of Oliver's Dock, opposite the stores owned by Governor Phillips, in Kilby street. The province built, for the residence of the governors, the house, which is shut from view, nearly opposite the head of Milk street, and with an Indian over the cupola. From the time of the adoption of the constitution, (1780) till the new state house was used (1798) the executive council met in that house.

Parsons, chief justice, lived and died in the wooden house next south of the Brick block, at the north east corner of Pearl street.

that some of our brethren keep their offices there,) was the very *Temple of Liberty.* Beneath its roof were expressed the manly sentiments of the provincial patriots; and there the sound doctrines were declared, which ripened into a determination to resist, and to be free. In the east chamber of this building the governor and council assembled, though the superior court occasionally sat there, and especially on that memorable trial, in which it was attempted to establish, by judicial decision, a most odious tyranny. Tudor's account of this trial, (Life of James Otis,) the best, which his materials would permit, though very imperfect, is the only one extant. In the Hall, in the centre, (over the first floor, formerly used as the exchange,) the representatives assembled. Adjoining this hall, at the westerly end, was the judicial court room. In 1767 the court house, in Court street, was built. This house was planned by Governor Barnard, who is said to have given the plan of that building at the University, which is known by the name of *Harvard.* The first jail ever built on this peninsula probably stood where the court house stands. It must have been near the street. The persecution of the Quakers began

in 1656; some were executed for being heretics, and many more banished. Hutchinson says, "as Governor Endicot was going from public worship to his own house, on the Lord's day, Mary Prince (a Quakeress) called to him from a window of the prison, railing at, and reviling him, and denouncing the judgment of God upon him."

Leaving more ancient times, we will briefly examine the effect of the Revolution, on our profession.* At the last Court held under the

* Before the Revolution, lawyers commonly went the Circuits with the Court. Eight dollars was the fee in a cause of magnitude. But not one in fifty is said to have been such. In the Inferior Court, argument for continuance was usually two dollars; and argument to a jury never exceeded five. *Read* built and lived in the house owned by Mr. Minot, opposite the court house, Court street. *Auchmuty* lived in the house next the engine house, School street. *John Adams* kept his office in a house which stood on a lot next above William Minot's. It is said that *Josiah Quincy, jr.* was the first lawyer, who put up a sign board. Chief Justice *Dana's* father lived at the corner of Wilson's lane. *Gridley* lived in the house next north of Cornhill Square. *Cazneau* in that next east of the court house, Court street. *James Otis* lived in the parish mansion, now occupied by the Rev. Mr. Palfrey. It is said that the Court were exceedingly civil towards the members of the bar. There was a dignity, and politeness, under the royal government, of which some striking instances survived the Revolution. But this truly

charter, PETER OLIVER was Chief Justice. EDMUND TROWBRIDGE, FOSTER HUTCHINSON, WILLIAM CUSHING, and WILLIAM BROWN, were the Judges. *Cushing* was the only one of these who afterwards appeared on the bench.

There were then in the whole Province thirty-six barristers and twelve attorneys, practising in the superior court. These, in common with all other persons, were driven to the necessity of deciding, whether they would adhere to the royal cause, or take the fearful chance of assisting to rescue the country from its oppressors, and on failure of the common effort, to be treated as rebellious subjects.

Of those who took the side of their country,

dignified, and complaisant deportment, seems to have refused all association with *crops, pantaloons, short waistcoats,* and *suspenders.* There was a peculiar manner, not unlike that referred to, among the *high officers,* who served in the revolutionary army. Governors Brooks, and Eustis, Generals Knox, Lincoln, and Jackson were, and Generals Cobb, and Hull still are, remarkable for this manner. It is not improbable that a familiar association with polished Frenchmen, may have had some agency in forming this manner, as it does not seem to be a necessary consequence of military life. Whencesoever derived, it is passing away with the men distinguished by this fine accomplishment.

sixteen survived the Revolution, and were afterwards distinguished at the bar, or both there and on the bench, and some of them in the highest offices in the gift of the people. Thirteen of them were royalists, and left the country; and among them *Jonathan Sewall*, then Attorney General, a man held in high esteem for professional talent; and *Sampson Salter Blowers*, who enjoyed an honorable reputation as a lawyer, and the esteem of many affectionate friends. Some who remained were neutral, so far as they could be, consistently with safety. The royalists who departed, and those who remained, are not to be censured at this day, for conscientious adherence to the mother country. The former had little reason to rejoice in the course which they adopted. Few received such reward for loyalty as they expected. Some exchanged eminence in the province for appointments, such as they were, in the colonies; and some ease and comfort *here*, for insignificance and obscurity *at home*. Most of them deeply regretted their abandonment of their native land. Such effect had the Revolution on the members of the bar, that the list of 1779 comprized only ten barristers, and four attorneys, for the whole state; who were such before the Revolution.

We duly appreciate the merit of those, who bore arms in the revolutionary conflict. But something is due to those of our profession, who had the courage to accept *judicial appointments*, and to administer justice, in a state, which a hostile government treated as a revolted province. The former might have escaped the fate of rebels, if a rebellion had been crushed; but the high powers assumed by the *judges*, and the small number of these, would have distinguished *them* as marks for vengeance, if the cause of liberty had been lost. One of our fraternity, who is present,* remembers a confidential conversation with one, who was nominated to the bench, while he was considering his answer, in which the hopes and fears of that eventful period were feelingly evinced. The appointment was accepted, and this gentleman took his seat on the bench, and died in the office of Chief Justice in 1792.

From the year 1776, to the present time, only two have been appointed to the Supreme Bench

* The Honorable Judge Wetmore, to whom I am indebted for many of the facts, which are stated, and for the manuscript reports alluded to.

who were not lawyers.* One of them, though not bred a lawyer, and not eminently qualified for his station, had been judge of the admiralty during the Revolution. But that office was not then supposed to require such learning and ability, as we have since known to be required, and such as we have been often called on to respect, to honor, and admire.

There was no essential change, but in *name*, in the Judicial Courts, and in the manner in which official duty was performed, from the commencement of the Revolution till the 4th of March, 1800. The Judges were then increased to *seven*. The office of Solicitor General was then filled. The Commonwealth was divided into the eastern and western Circuits. Three judges constituted a quorum. We had then *two* Supreme Judicial Courts! The evils of such an establishment were soon apparent. The clerk's office was kept in Boston for the whole State. The law, and the fact, went to the jury together. There was no opportunity for the judges to consult books, or to confer, but while sitting on the bench. There was no revision to correct error, but by process of review. Some experienced

Jedediah Foster. James Warren did not accept. Nathan Cushing.

men were found to have a most happy recollection of adjudged cases, which existed nowhere but in memory. The recollections of adverse counsel, as to the same case, could rarely be reconciled. This experiment lasted less than four years.

In February 1804, a committee, composed of one member of the Legislature from each county, assembled in the house, which Sir *Harry Vane* built,* and gave to the first church, on his departure for England. After long discussion, this committee agreed to report, as mere experiment, that one judge should be authorized to remain in a county, to try questions of fact, after the business requiring three judges should be disposed of, and then join the judges in the next county. A single year was sufficient to satisfy the whole Commonwealth, of the utility of such a system, properly carried into effect. In March, 1805, the organization, under which we now practise, was permanently established, and with it began our second volume of reports.†

* This house is next to Governor Phillips' mansion in Tremont street, northwardly.

† It is due to a gentleman who now adorns the bench of the *national* judiciary, to remind the profession of his independent

The profession has been thus placed in its proper relation to the administration of justice. It is possible that some improvements may yet be made by the organization of a court of error; and by the erection of a court of chancery. The act of 1692, before referred to, provided for a high court of chancery. The powers were vested in the governor and eight of his council, until a chancellor should be appointed. But no chancellor was appointed, nor did the governor and council ever act as a court of chancery. There seems to have been an inveterate prejudice in the province, and state, against such a court; but it is wearing out, and the opinion is gaining ground, that such a court is necessary.*

and effectual labors to promote the honor, and respectability, of the *state* judiciary. While this gentleman was a member of one branch of the Legislature, (over the deliberations of which he was afterwards called to preside,) he labored successfully to place the judges in that relation to the public, which the constitution not only *implies*, but positively *commands*.

* Generally, the jurisdiction of a court of chancery is to relieve against accidents and mistakes; to adjust and settle complicated accounts, to prevent and relieve against frauds, especially in trusts; to take care of the rights of minors; to compel the specific performance of agreements. It is apparent that in many cases, that fall under some of these divisions, there can

When the order of barristers was created, is not known. There is no law providing for it, nor any tradition concerning it. It must have been by *rule of court*, not now to be found. A statute in 1782, empowered the court to confer this degree; but no barristers were called after

be no adequate remedy at law. The common law knows of no remedy but compensation in damages, (except in relation to real estate.) This is often an insufficient remedy, when attainable. Where the fact, on which the remedial decree is sought, is known only to the complainant, and the party complained of, there is no remedy, but by application to the conscience of the party. Such cases frequently occur in matters of trust, and to obtain discovery of evidence, material to the establishment of a right. The powers of chancery are admirably adapted to the protection of the rights of minors; and to the enforcing a strict performance of trusts; and to compel the correction of clearly proved mistakes in contracts; and to hold a contracting party to do the act which he engaged to do. The *horror*, which is entertained, is very much misapplied to the *chancery jurisdiction*, however well founded it may be as to the *practice* under it, in England. It is not to be denied that, in that country, the practice is dilatory, expensive, perplexing; and is, in fact, a science by itself. It by no means follows, that by adopting the *spirit* of this jurisdiction, we must adopt the English forms of practice. We have escaped from the entanglements of English conveyancing, and of English common law practice, and have adopted simple modes of coming to the same results. The same good sense would, undoubt-

1784. Chief Justice *Parsons*, and Judge *Sedgwick* were the last barristers, who sat upon the bench. This distinction was wisely discontinued. The division into attorneys, and counsellors, established by rule of court in 1806, is probably the best that can be. There are but two barristers now living, both of whom are present.—(Attorney General Morton, Hon. Judge Wetmore.)*

edly, govern in establishing the forms, and rules of practice in chancery, if such a tribunal were established in this state.

It is remarked by an able writer on chancery jurisdiction, that "the chancellor does not act, as is vulgarly supposed, according to an unbounded discretion, *nunc severius nunc mitius agendo prout viderint expedire.*"

(In Bond *vs* Hopkins, 1 Sch. and Lefroy, 428.) Lord *Redesdale* says, "there are certain principles on which courts of equity act, which are very well settled. The cases which occur are various, but they are decided on fixed principles. Courts of Equity, have in this respect, no more discretionary power than courts of law. They decide new cases, as they arise, by the principles on which former cases have been decided; and may thus illustrate or enlarge the operation of of those principles; but the principles are as fixed and certain, as those on which the courts of common law proceed.

* For several years the bar complained, and had cause to complain, of the extreme austerity of the court. The dignified complaisance, which existed before the Revolution, and the

If data were preserved, it would be easy to institute a comparison, as to the productiveness of labor in the various departments of industry, and especially as to those, which may be called purely intellectual. Some guide might thus be had in the selection of professions; and the overstocking of any one department, might be prevented. This supposition may be illustrated by the following statement, which is far from

gentlemanly courtesy, which we have witnessed for many years, were wholly unknown. Alluding to these manners, *Fisher Ames* said, that a lawyer should go into court, with a club in one hand, and a speaking trumpet in the other. It should be remembered with respect, and gratitude, that when Judge *Sedgwick* appeared on the bench, he successfully strove to banish this unnecessary deportment. He endeavored, also, to prevent the *sparring*, at that time, very common at the bar. Mr. Parsons, and the Attorney General (of that time) were often opposing counsel; and almost as often personal opponents, so far as *a keen encounter of wits*, could make them so. Those who were engaged in business, in these days, did not think that all the judges always observed two of the things, which Sir Matthew Hale prescribed to himself, on taking his seat upon the bench, as "necessary to be continually had in remembrance."

"That I suffer not myself to be prepossessed with any judgment at all, till the whole business, and both parties, be heard."

"That I never engage myself, in the beginning of any cause; but reserve myself, unprejudiced, till the whole be heard."

exact, but may be sufficiently so for the present purpose.

The average of years, to which professional labor may be extended, may be thirty-eight, that is from twenty-two to sixty years of age. A generation is said to last twenty-eight years. If we take these twenty-eight years between the first of January 1784, and the first of January 1813, we shall embrace a period as various in good, and ill fortune, as any which has occurred, (the revolutionary period excepted,) or any which is likely to occur. Within this space, many attempts were made to render the profession odious. The circumstances of the country, from the peace of 1783, to the adoption of the Federal Constitution, were exceedingly oppressive. In such times, professional agency has a very direct relation to real, or imaginary evils. The vice of the times, or the unwelcome operations of government, are referred to those whose duty it is to aid, in coercing the performance of contracts, or in furnishing a legal remedy for wrongs. Our profession was most reproachfully assailed by newspaper essayists; and even the legislature entertained projects of

reform in practice, a reforming which belongs, when necessary, exclusively to the courts.

In these twenty-eight years, one hundred and twenty-seven practitioners appeared in the supreme court in this county. Of this number, thirty-four left the profession before they had been half the assumed time of thirty-eight years in practice. They left it, because they had become independent of practice, from various causes, *but not from the receipt of fees.* Of the one hundred and twenty-seven, eight withdrew in consequence of popular election, or of executive, or other appointments. Four of these returned to the practice. Fifteen left the bar before they had been nineteen years in practice, *and engaged in other pursuits.* Nineteen died before half the supposed term (of thirty-eight years) had elapsed. *Not one fourth of these left any property, acquired in the profession. A majority of them left no property.* Eleven departed from the county, to try their professional fortune elsewhere. Some of them succeeded, and some entirely failed.

Eight may be said to have survived practice. Thirty-two of the one hundred and twenty-seven

are still in practice, and to these have been added so many as to make, at present, one hundred and sixteen.

It is probable that none of the departments of intellectual labor, presents a more discouraging view, to one who can choose his cast in society, than our own. No class of men devote more days of the year to responsible and wearing labor than we do. No class of men, collectively taken, have less to show as the product of labor. No class, consequently, have less hope of withdrawing from labor, and from the world, free from that solicitude, which belongs to the human heart, in relation to those, who may be left behind. The physician, the clergyman, the merchant, continue in, and feel a strong interest in their employments, to the last hours of life; while the lawyer is ever ready to escape from his slavery, when the proper opportunity offers. Our clients judge only from the *short process* of submitting a cause to a court, or to a jury. They make little account of the years, which are spent in preparatory studies; very little of the anxious and laborious hours, spent in preparing for that *seemingly short process,*

while themselves are engaged in their pleasures, or devoted to repose. But this is the sombre side of the picture. If this world were intended for no other purpose, than to supply the common wants of our nature, if there were no such thing in it as the gratification of being useful to others, and serviceable to those, who come after us, in preserving, and transmitting free government, and individual, and national character, the common yeomanry of the land might claim a better existence than professional laborers. If we are poor in fee simple, in freehold, in choses in action, and in chattels; if the quarter days of the nation, and the semiannual periods of monied institutions, have no attractions for us; if we cannot expect to leave heirs, who will be thankful for our saving knowledge, or good luck, we have something to console us in our necessary connexion with the well being of society, and in the promotion of the general good. We may relieve the dejection which comes over us, in the exhibit of professional poverty, by adverting to the confidence, which our fellow-citizens, in this free and happy land, have been pleased to repose in us. Within the memory of many

who are present, the bar of Suffolk has yielded a President, and Vice President, of the United States.*

Three Chief Magistrates of this State.

One Chief Justice, and five other Justices of the Supreme Judicial Court.

One Judge of the United States Circuit Court, and one District Court Judge.

Five Senators in Congress.

Eight Representatives in Congress.

Two Ambassadors, and one Commissioner, in Europe.†

Thrice the office of Attorney General has been filled from this bar.

The office of President of the Senate has been twice, and the office of Speaker of the House of Representatives thrice filled by members of our fraternity.

Fifteen of this bar have been Senators in Massachusetts.

The office of Comptroller of the national treasury, that of Secretary of War, and that of Sec-

* We have now the gratification of adding a *second* President of the United States from this bar.

† And very lately another is added to the class of foreign ministers.

retary of State, have been held by some of our members.

Many other offices of less distinction, have been honorably filled by individuals of our association. Similar notices might be made of the profession in other counties of the state. Extending our view beyond our own circle, we find, that the President of the United States, the Vice President, all the heads of departments, all our foreign ministers and public envoys, but four, and one third of each house of Congress, were regularly bred to the profession, and most of them have been actively engaged in it. At the present period, a member of our fraternity, in one of the halls of Congress, has called forth the admiration of the American people, by his profound and able survey of the past, the present, and the probable condition, of the civilized world. Inspired by the struggle for freedom in regenerating *Greece*, he ascended to an elevation, from which he seemed to overlook the cabinets of Europe, and to speak to those who are *crowned*. We may fairly infer, that the professors of the law, in republican governments, are necessarily connected, whether in private life, or public employment, with the just

and faithful administration of the laws. It is our interest to make ourselves worthy of this relation. While some of us may be selected for public trust and confidence, others of us must toil on in our vocation, satisfied with our tenancy in common of the fame, which is shed on our class, by its distinguished members. That portion of us, who are to spend our lives in the course of professional employment, find that our labors are severely increased, by the *multiplication of books*, which we are forced to examine.*

* It has been urged by learned and able men, that "codification" is an effectual remedy for the multiplication of books. The Justinian, and Napoleon Code prove, it is said, that such remedy is practicable. Others are of a different opinion. When the Justinian Code was compiled, there were two thousand volumes of Roman law. All were of more or less authority, though varying and even contradictory. A revision under some commanding authority was indispensable. But commentaries, and expositions, soon followed. Had the Eastern empire continued in prosperity, these must have so multiplied, as to have brought back the evil, which the compilation was intended to cure.* Whatever commendation the Napoleon Code may de-

* The Eastern empire continued about 920 years after the establishment of the *Justinian Code;* (A. 533.) the first 120, in a state of rapid decline. Gibbon (chap. 48.) speaking of the last 800 years, says, "the first four centuries are overspread by a cloud, interrupted by some faint and broken rays of historic light."—"In the four last," a succession of

Our duty seems to be comprised rather in *distinction making* among adjudged cases, than in applying general, and acknowledged principles, to the case to be decided. It is not easy to dis-

serve, there are already numerous commentaries on this work. It is impossible that an abstract rule should settle all cases. The endless variety of business transactions, and the nature of proof, by which they are to be legally verified, will escape the sound application of any general rule.

The law of any country must depend on the condition of its population; and on what is owned, claimed, done, or omitted. This condition is continually changing. This is seen in the course of industry, in language, in the forms of social life. The *permanent* law, as it is taken to be, must submit to change also. In the preface to Rolle's Abridgment, we find how many titles in the law, once of great importance, had become, at that time, obsolete; how many new ones had *then* come into use. We know that many more have since followed the same

priests and courtiers, tread on each others steps in the same paths of servitude, and superstition."—From thence, (1453) the once splendid city, in which the code was compiled and promulgated, (and in which, and its dependent regions it was designed to rule,) has been the seat of *Turkish* dominion.

Justinian seems to have legislated, not for his *own*, but for *other* empires; and to have secured to his name a long enduring renown, not where he believed it would be celebrated, but among nations, and in times, which no suggestion of his self-love, no hope of his ambition, could have embraced.

At what time, and in what places, the study of the *civil law* was resumed, has been shewn by *Hallam* in his learned, and philosophical work on "*the middle ages*," (vol. iv. pages 366—374.)

cern a remedy for this time-consuming, and wearisome employment. Perhaps a division of labor, according to the course adopted in Eng-

fate; that ancient forms have been moulded, and new ones invented, to meet new relations. The process of change is not likely to cease. Will there be no contrasts between these days, and those of one or two centuries, in the future? The *common law* will not submit to the trammels of "codification." No small portion of it can be known only by the discernment, and application of its rules, by wise, experienced, and honest men, to cases as they arise. The common law may be compared, as the English constitution has been, to a knit garment, which adapts itself to the form, by which it is worn. Adjudged cases are, and ought to be guides, where they apply. But these also yield to the necessity created by changes.

If all the learning, and industry, which could, by any means, be brought to the labor of "codification" were employed, and the object could be accomplished, the new code could hardly be learned, by those who must apply it, before events, in this expanding empire, *and the love of statute making*, would virtually repeal many of its provisions. It would soon serve to no other purpose, than to make a new embarrassment in ascertaining the law.

The common law, so far as it is susceptible of "codification," is continually undergoing that process by professional industry. Treatises, on particular subjects, are the best sort of code making. These have greatly increased. Some have appeared in our own country. The new edition of Comyns, by Hammond, is a code of itself. *Danes* learned work, now in the course of publication, may be, in our state, what

land, might be some relief; but it will be yet a long time, before society shall be sufficiently advanced in wealth, and numbers, to allow of this.

Hammond's Comyns is to an English lawyer, and undoubtedly a most valuable addition to the professional library.

Books will multiply, so long as they are saleable. The only relief from the expense of purchasing seems to be, to form social libraries; and to possess indexes, to facilitate the business of research. There are many valuable works of this kind. *Jeremy* has lately published an index of his own indexes!

Once, in a lapse of many years, an able commentator will arise, who will digest the materials, which have accumulated, and become, according to his merit, an accredited authority. Such a one was, most eminently, Sir *William Blackstone.*

Such a one, it is to be hoped, will be *Chancellor Kent.*

To give some idea of the effect of codification, it is only necessary to mention a *part* of the title of one of the numerous works, which has followed the Napoleon Code.

"Législatiòn, et jurisprudence des successions, selon le droit ancien, le droit intermédidire, et le droit nouveau, *ou,*

Rapprochement des dispositions de l'ancien droit, et des arrêts des parlemens, sur les successions règulières, et irrègulières, *avec* les dispositions des lois et décrets intermédiaires, *codes,* lois, et dècisions postèrieures, ordonnances royales, arrêts de la cour de cassation, des cours royales, et des opinions des plus celèbres jurisconsultes, &c. &c."

This work relates only to 34 pages of the Napoleon Code *civile,* out of 478; and is extended through three closely printed octavo volumes.

Among the efforts, which we have made to promote the honor, and interest of our profession here, we may properly advert to our voluntary constitution, out of which has arisen our charitable fund; our salutary regulations, and the pleasure of periodical meetings for fraternal communion. And we may justly pride ourselves in the establishment of our *social library*, which, if it be not now, will soon be, the best on this side of the Atlantic. In connexion with this subject, we cannot omit a passing tribute to the gentleman, who *first* suggested that institution. In common with the whole State, we deeply feel his early departure from the station, which he eminently filled. Separated as he is from us, and beyond the reach of any eulogy, which we can make, it may become us to express our sorrow for the cause of his early removal, and our regrets that his public labors could not be prolonged to the fulness of years, which lately removed another magistrate from the same bench. Nor can it be unacceptable to you, to express the hope, that his unsullied virtue, patient industry, intellectual force, and manly independence, may yet adorn some department of the public service. It becomes us

to remember this gentleman with respect, and gratitude, since he has not forgotten us in his absence.*

However pleasant it may be to console ourselves for anxious labors, by adverting to the honors, which distinguished individuals attract to our class, this pleasure must be forborne, and these hasty, and desultory remarks must draw to a close. Having detained you so long, I must omit some suggestions, which were intended, on the establishment of an *historical society* among ourselves ;† and on the means of preserving

* The Hon. Judge Jackson received, through the obliging agency of JOHN HOPE, Esq. the *Solicitor General of Scotland*, the beautiful and splendid edition of the Acts of the Scottish Parliaments, published by the King's Commissioners, which now constitutes a part of the Social Law Library. This work having been intended for distribution among public officers, and public institutions, and, probably, not to be purchased, the obligation to Mr. HOPE, will be the more sensibly felt, by the members of our association. Progressive refinement *in language*, is more clearly shewn, by these volumes, than by any which have appeared.

† Whether an *Historical Society* for the profession would be well kept up, if established, is very doubtful. Labor, which promises neither honor nor emolument, is not to be expected. Such a society, if it did all that could be done, would present a valuable fund of information to distant times. Among its objects

what may yet remain of those who are gone before us; and of their agency in the great events, which have occurred; and on the means of providing against that waste by time, which will soon place us, and our agency, with men and things, that have been.

might be, to notice changes in jurisprudence and in practice; new professional works; public occurrences, having relation to the profession; the duration of professional life, at the bar, and on the bench; excellencies, or defects, in professional eloquence; and many other things. Such a society would not assume, (as a law of the Egyptians required,) to decide on the kind, and degree of reputation, which should belong to the *deceased;* but it would give *truer* information concerning those who have passed away, than can be had from biographical sketches of friends, or from eulogies suggested by the sense of bereavement. A distinguished scholar, and most acute observer of human nature has remarked, that "*our country is an excellent one to die in.*" Almost every reader among us knows more of the life of Dr. *Johnson*, than he knows of his own remarkable countrymen. Many know more, (if *Plutarch* is to be relied on,) of some Grecians, and Romans than he knows of *Washington* and *Hamilton*, apart from those of their acts, which are interwoven with national history. There is little probability now, that we shall ever know more of these two memorable men. That which is desired, exists only in memory, and is rapidly passing away. Certainly the utility of recording and transmitting the virtues and services of the *deceased*, must be as great in a *republic*, as in any other form of

If we have not mistaken the relative rank of the professors of the law, in a government of laws, it is obvious, that the JUDICIARY should hold a far higher rank. If the task of practising lawyers is irksome, and wearing, we should remember, *and the public ought to realize*, that no small part of all the heaviest labors, not only in this, but in all the counties of the State, must

government; and these notices may not be the less useful, if virtue, and talent, should happen to be exhibited in the life of a *lawyer*. Curiosity is not satisfied with knowing what is merely *public*, in the life of distinguished men. It requires to know in what sort of human frame, by what modes of action, by what intellectual habits, distinction was acquired; it wants to know something of the *hours*, which an individual considers to be his own. There are materials existing to form the beginning of an interesting collection. Portraits, letters, manuscripts, and various relicks would be surrendered by families to an historical society of the profession.

But a *union* of labors for such purpose, is not to be expected. Few, if any, will be found sufficiently at leisure, and sufficiently excited, to provide for the instruction, or entertainment of remote generations.

With a view to do something towards preservation, and transmission, it was intended to prolong this note, by selections from memoranda, made during the last twenty-five years. But as delineations of professional gentlemen *who have been*, as to person, manners, habits of business, modes of preparation, brief making, peculiarities of speaking, &c. &c. might seem to

be revised by *four* individuals in *the last resort.* Every case, which requires a deliberate judgment, must have two sides to it; both will be argued with the zeal and ability, which arises from the conviction of being on the right side. It devolves on the small number of *four judges,* to extract the right from conflicting evidence, from many, and contradictory authorities, and from the earnest, and opposing arguments of diligent counsel. A still higher duty is confided to these judges; one, which is not confided to any tribunal in the country, from which we derive our knowledge of judicial authority. It belongs to our Supreme Court, not only to admin-

some persons, assuming to do more than would be proper, the intention has been abandoned.

One who ventures to delineate the characters of those, who have been his contemporaries, must remember that he paints for the eye of *descendants,* and *friends,* who will complain of whatsoever does not give pleasure, or gratify pride. He must do more than observe the rule,

> Nec tibi quid liceat, sed quid fecisse decebit
> Occurrat.

But every one, who proposes to engage himself in the business of the world, will find great benefit from the daily, and diligent observance of the rule of HORACE;

> Respicere exemplar vitæ morumque jubebo
> Doctum imitatorem, et veras hinc ducere voces.

ister justice between citizen and citizen, and between the government and its citizens, but to correct the error, which may happen in the legislative department, when the limits of the constitution are transcended. It may occur, in a popular government, that legislators misapprehend their power, or are misled by some strong excitement; and it is one of the best features in our system, that it has established an authority to try alleged departure from constitutional principle; and by calm, deliberate, conscientious judgment, to keep the spheres in their own paths.

We are peculiarly qualified to feel the true relations of the judiciary in such a government; and our own intimate connexion with it. We fully realize that whatever tends to impair the honor and independence of the *Judiciary*, tends no less to deprive us of our social rank.